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**Mark E. Matthews,**

*Deputy Commissioner for Services and Enforcement.*

Approved: December 3, 2003.

**Gregory Jenner,**

*Deputy Assistant Secretary (Tax Policy).*

[FR Doc. 03-31033 Filed 12-16-03; 8:45 am]

**BILLING CODE 4830-01-P**

## **EQUAL EMPLOYMENT OPPORTUNITY COMMISSION**

### **29 CFR Part 1626**

**RIN 3046-AA54**

### **Procedures—Age Discrimination in Employment Act**

**AGENCY:** Equal Employment Opportunity Commission (EEOC).

**ACTION:** Final rule.

**SUMMARY:** This rule revises the regulations on the processing of age discrimination charges to provide that the Commission will issue a notice, when it has dismissed or otherwise terminated the processing of an age discrimination charge, that the right to file a lawsuit on the charge under the Age Discrimination in Employment Act (ADEA) will expire in 90 days. These amendments also delete references to the previously applicable two- or three-year limitations period for filing a civil action. Finally, EEOC is deleting its list of ADEA referral states because the list is obsolete and unnecessary. These changes conform the Commission's regulations to the procedures adopted by the Commission to implement section 115 of the Civil Rights Act of 1991.

**EFFECTIVE DATE:** January 16, 2004.

**FOR FURTHER INFORMATION CONTACT:**

Thomas J. Schlageter, Assistant Legal Counsel at (202) 663-4669 (voice) or (202) 663-7026 (TTY). This final rule is also available in the following formats: large print, braille, audiotape and electronic file on computer disk. Requests for this notice in an alternative format should be made to EEOC's Publication Center at 1-800-669-3362.

**SUPPLEMENTARY INFORMATION:** The Commission published a Notice of Proposed Rulemaking (NPRM) in the **Federal Register** on August 12, 2002 (67 FR 52431), proposing revisions to part

1626 of its regulations. These changes were proposed to (1) conform the Commission's regulations to the procedures it adopted for the processing of charges under the Age Discrimination in Employment Act (ADEA) following passage of section 115 of the Civil Rights Act of 1991 (CRA) and (2) delete an obsolete and unnecessary list of State Fair Employment Practices Agencies to which EEOC will send copies of ADEA charges.

The current § 1626.7(a) provides that charges will not be rejected as untimely provided that they are not barred by the statute of limitations contained in section 6 of the Portal to Portal Act. This provision recognized the Commission's authority to file suit within the Portal to Portal Act's limitation period even if the aggrieved party did not have a private right of action because the charge was filed more than 180 days (or 300 days in a referral jurisdictions) after the discriminatory event took place. Following passage of the CRA, the statute of limitations contained in the Portal to Portal Act is no longer applicable to ADEA lawsuits filed by either the aggrieved party or the Commission. We therefore proposed to delete the current § 1626.7(a). The Commission will dismiss ADEA charges filed more than 180 days (or 300 days in a referral jurisdiction) after the discriminatory act, absent waiver, estoppel or equitable tolling.

The current § 1626.9(b) and (c) contain a list of states to which the Commission refers charges under section 14(b) of the ADEA. These lists were created when there were relatively few such agencies. Since almost all states now have laws prohibiting age discrimination, we proposed to delete the lists because they are obsolete and unnecessary. The regulation continues to provide that the Commission will refer age charges to appropriate state agencies.

Section 7(d) of the ADEA requires that, upon receipt of a charge, the Commission shall promptly attempt to eliminate any alleged unlawful practice by informal methods of conciliation, conference and persuasion. Under current § 1626.12, EEOC issues a notice if this attempt at conciliation fails. To eliminate any possible confusion between this failure of conciliation notice and the new Notice of Dismissal or Termination (NDT), we proposed to add a sentence to § 1626.12 stating that notice under this section is not a Notice of Dismissal or Termination under § 1626.20.

The second sentence and last two sentences of the current § 1626.15(b) concern the tolling of the ADEA's

statute of limitations during EEOC conciliation. Because this tolling provision no longer applies, we proposed to delete these sentences. We also proposed an editorial change to the third sentence, eliminating a reference to the current second sentence that was being deleted.

The Commission proposed to add three new sections. Section 1626.17 was modeled on 29 CFR 1601.28 and provides for issuance of a Notice of Dismissal or Termination to an aggrieved person when EEOC dismisses or otherwise terminates its processing of an ADEA charge. Notification will be made by issuing a Notice of Dismissal or Termination to each aggrieved person. In the case of a charge concerning more than one aggrieved person, Notices of Dismissal or Termination will only be issued when the charge is dismissed or EEOC's proceedings are terminated as to all aggrieved persons.

Section 1626.18 concerns the institution of private civil actions. Paragraph (a) states that a civil action may be filed by an aggrieved person in either federal or state court under section 7 of the ADEA. Paragraph (b) makes clear that an aggrieved person need not wait for a Notice of Dismissal or Termination to be issued in order to file a civil action, but can file suit on a pending charge any time after 60 days have elapsed from the filing of the charge. Paragraph (c) provides that the right to file a private suit under the ADEA expires 90 days after receipt of a Notice of Dismissal or Termination. Paragraph (d) provides that when the Commission becomes aware that an aggrieved person has filed a private lawsuit under the ADEA against the respondent named in the charge, the Commission will terminate further processing of the charge or the portion of the charge affecting that person unless it is determined that further proceedings will effectuate the purposes of the ADEA.

Section 1626.19 clarifies that, unlike Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e, and Title I of the Americans with Disabilities Act, 42 U.S.C. 12101 *et seq.*, the ADEA does not require the filing of a charge before the Commission has authority to investigate and litigate a possible violation of the ADEA. In addition, the termination of proceedings on an age discrimination charge and the issuance of a Notice of Dismissal or Termination does not prevent the Commission from investigating or litigating a matter that may have been the subject of or related to a charge on which a Notice of Dismissal or Termination was issued.

Two comments were received in response to the NPRM. Both expressed support for the proposed revisions. They noted that conforming the regulations to existing practice would provide helpful clarification and avoid unnecessary confusion.

In addition to this over-all support for the proposed changes, one of the two commenters encouraged the Commission to exercise thoughtful restraint in enforcing the ADEA where a timely charge has not been filed or after a Notice of Dismissal or Termination has been issued. This comment did not request any change in the regulation. The Commission does, however, want to reassure the commenter that it intends to exercise its enforcement discretion responsibly. The other commenter suggested further clarification of §§ 1626.17(a), 1626.17(a)(3), and 1626.18.

In § 1626.17(a), we proposed that Notices of Dismissal or Termination be issued in the case of a charge involving more than one aggrieved person only when EEOC terminates its processing as to all aggrieved persons. The commenter suggests that it would better serve judicial economy to issue Notices of Dismissal or Termination to the aggrieved persons seriatim during the process as we make determinations rather than to all at the end. We disagree and think the suggested alternative would be inefficient and not serve judicial economy. Seriatim issuance would likely lead to consecutive court filings by individuals as they receive the Notices and either premature termination of EEOC's processing of the remainder of the charge or early EEOC intervention in the lawsuit(s). The Commission believes that its proposal better serves efficiency and judicial economy by allowing orderly completion of the administrative process, appropriate pre-suit conciliation efforts by EEOC and contemporaneous filing of individual lawsuits.

In § 1626.17(a)(3), we proposed that the issuance of a Notice of Dismissal or Termination would not preclude the Commission from offering the recipient of the notice such assistance as it deems necessary or appropriate or from continuing to investigate. The commenter argues that this is vague, could mislead the aggrieved person into thinking that EEOC will intervene in his or her lawsuit and overstates EEOC's authority. The proposed language on rendering assistance was borrowed from our Title VII and ADA procedural regulations. See 29 CFR 1601.28(a)(4) ("The issuance of a notice of right to sue does not preclude the

Commission from offering such assistance to a person issued such notice as the Commission deems necessary or appropriate."). That language has appeared in 29 CFR 1601.28 for over 25 years. We are not aware of any evidence that this language has been found to be confusing or that individuals have been misled by it. Furthermore, the statement that the Commission could continue to investigate or litigate after a Notice is issued is simply a recognition that the Commission's jurisdiction under the ADEA is not dependent on the filing of a charge.

In § 1626.18(b), we state that an aggrieved person who files a charge may file a lawsuit without waiting for a Notice of Dismissal or Termination as long as 60 days have passed since the filing of the charge. The commenter argues that § 1626.18 does not present a clear picture of the aggrieved person's right to file a private lawsuit because, among other things, it does not mention that the right to file an individual lawsuit terminates if the Commission files suit on the charge. We agree that the individual's right to file a lawsuit is terminated when the Commission files a lawsuit and have added some language to § 1626.18(c) to make that clear. The commenter also argues that subsection (b) either makes an unwarranted assumption not based on clear statutory language or places undue emphasis on the 60-day provision of the ADEA. We believe subsection (b) is based on clear statutory authority allowing a private ADEA lawsuit to be filed anytime after 60 days from filing of the charge up to 90 days after issuance of the Notice of Dismissal or Termination or the filing of a Commission lawsuit. We do not believe that § 1626.18 gives improper emphasis to the right to file a lawsuit before the Notice is issued.

In § 1626.18(d), we stated that the Commission "may" dismiss a charge if a private lawsuit has been filed. The commenter states that the word "may" in subsection (d) should be "shall" because "may" implies that the Commission has unfettered discretion. Proposed subsection (d) provided that the EEOC "may" dismiss a charge if a private lawsuit is filed on the charge unless an EEOC official determines that further processing would effectuate the purposes of the Act. The effect and intent of the proposed provision, as indicated in the preamble to the NPRM, was that EEOC would terminate further proceedings unless an appropriate official made an affirmative determination that further processing would effectuate the purposes of the Act. While we do not think that the use

of "shall" instead of "may" changes the result, we agree with the commenter that "shall" makes more sense in light of the "unless" clause and have made that change.

Finally, we made three minor editorial changes. We changed "Associate General Counsel" to "General Counsel" in §§ 1626.17(b) and 1626.18(d). We modified § 1626.17(c)(2) slightly to mirror the similar, but better stated, language in § 1626.17(a)(1). We also added a cross reference to § 1626.12 in § 1626.18(b).

## Regulatory Procedures

### *Executive Order 12866*

Pursuant to Executive Order 12866, EEOC has coordinated this final rule with the Office of Management and Budget. Under section 3(f)(1) of Executive Order 12866, EEOC has determined that the regulation will not have an annual effect on the economy of \$100 million or more or adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or State or local tribal governments or communities. Therefore, a detailed cost-benefit assessment of the regulation is not required.

### *Paperwork Reduction Act*

This final rule contains no new information collection requirements subject to review by the Office of Management and Budget under the Paperwork Reduction Act (44 U.S.C. chapter 35).

### *Regulatory Flexibility Act*

The Commission certifies under 5 U.S.C. 605(b) that this final rule will not have a significant economic impact on a substantial number of small entities, because it does not affect any small entities. The regulation affects what the Commission does and what aggrieved parties can do. For this reason, a regulatory flexibility analysis is not required.

### *Unfunded Mandates Reform Act of 1995*

This final rule will not result in the expenditure by State, local, or tribal governments, in the aggregate, or by the private sector, of \$100 million or more in any one year, and it will not significantly or uniquely affect small governments. Therefore, no actions were deemed necessary under the provisions of the Unfunded Mandates Reform Act of 1995.

**List of Subjects in 29 CFR Part 1626**

Administrative practice and procedure, aged, equal employment opportunity.

Dated: December 10, 2003.

For the Commission.

**Cari M. Dominguez,**  
*Chair.*

■ For the reasons set forth in the preamble, EEOC amends 29 CFR part 1626 as follows:

**PART 1626—PROCEDURES—AGE DISCRIMINATION IN EMPLOYMENT ACT**

■ 1. The authority citation for part 1626 continues to read as follows:

**Authority:** Sec. 9, 81 Stat. 605, 29 U.S.C. 628; sec. 2, Reorg. Plan No. 1 of 1978, 3 CFR, 1978 Comp., p. 321.

**§ 1626.7 [Amended]**

■ 2. Section 1626.7 is amended by removing paragraph (a) and redesignating paragraphs (b) and (c) as paragraphs (a) and (b).

**§ 1626.9 [Amended]**

■ 3. Section 1626.9 is amended by removing the paragraph designation “(a)” and by removing paragraphs (b) and (c).

■ 4. Section 1626.12 is amended by adding a sentence at the end of the section to read as follows:

**§ 1626.12 Conciliation efforts pursuant to section 7(d) of the Act.**

\* \* \* Notification under this section is not a Notice of Dismissal or Termination under § 1626.17.

**§ 1626.15 [Amended]**

■ 5. Paragraph (b) of § 1626.15 is amended by:

- (a) removing the second sentence;
- (b) removing the words “Such notice will” and adding in their place, the words “Notice of commencement of conciliation will”; and
- (c) removing the last two sentences.

**§§ 1626.17, 1626.18, 1626.19 [Redesignated as §§ 1626.20, 1626.21 and 1626.22]**

■ 6. Sections 1626.17, 1626.18 and 1626.19 are redesignated as §§ 1626.20, 1626.21 and 1626.22.

■ 7. A new section 1626.17 is added to read as follows:

**§ 1626.17 Notice of Dismissal or Termination.**

(a) *Issuance of Notice of Dismissal or Termination.* (1) Where a charge filed with the Commission under the ADEA is dismissed or the Commission’s

proceedings are otherwise terminated, the Commission will issue a Notice of Dismissal or Termination on the charge as described in paragraph (c) of this section to the person(s) claiming to be aggrieved. In the case of a charge concerning more than one aggrieved person, the Commission will only issue a Notice of Dismissal or Termination when the charge is dismissed or proceedings are otherwise terminated as to all aggrieved persons.

(2) Where the charge has been filed under the ADEA and Title VII or the Americans with Disabilities Act (ADA), the Commission will issue a Notice of Dismissal or Termination under the ADEA at the same time it issues the Notice of Right to Sue under Title VII or the ADA.

(3) The issuance of a Notice of Dismissal or Termination does not preclude the Commission from offering such assistance to a person receiving the notice as the Commission deems necessary or appropriate. The issuance does not preclude or interfere with the Commission’s continuing right to investigate and litigate the same matter or any ADEA matter under its enforcement authority.

(b) *Delegation of Authority to Issue Notices of Dismissal or Termination.* The Commission hereby delegates authority to issue Notices of Dismissal or Termination, in accordance with this section, to: District Directors; Area Directors; Local Directors; the Director of the Office of Field Programs; the General Counsel; the Director of Field Management Programs, Office of Field Programs; or their designees.

(c) *Contents of the Notice of Dismissal or Termination.* The Notice of Dismissal or Termination shall include:

- (1) A copy of the charge;
- (2) Notification that the charge has been dismissed or the Commission’s proceedings have otherwise been terminated; and
- (3) Notification that the aggrieved person’s right to file a civil action against the respondent on the subject charge under the ADEA will expire 90 days after receipt of such notice.

■ 8. A new section 1626.18 is added to read as follows:

**§ 1626.18 Filing of private lawsuit.**

(a) An aggrieved person may file a civil action against the respondent named in the charge in either Federal or State court under section 7 of the ADEA.

(b) An aggrieved person whose claims are the subject of a timely pending charge may file a civil action at any time after 60 days have elapsed from the filing of the charge with the Commission (or as provided in

§ 1626.12) without waiting for a Notice of Dismissal or Termination to be issued.

(c) The right of an aggrieved person to file suit expires 90 days after receipt of the Notice of Dismissal or Termination or upon commencement of an action by the Commission to enforce the right of such person.

(d) If the Commission becomes aware that the aggrieved person whose claim is the subject of a pending ADEA charge has filed an ADEA lawsuit against the respondent named in the charge, it shall terminate further processing of the charge or portion of the charge affecting that person unless the District Director; Area Director; Local Director; Director of the Office of Field Programs; the General Counsel; the Director of Field Management Programs; or their designees determine at that time or at a later time that it would effectuate the purpose of the ADEA to further process the charge.

■ 9. A new section 1626.19 is added to read as follows:

**§ 1626.19 Filing of Commission lawsuit.**

The right of the Commission to file a civil action under the ADEA is not dependent on the filing of a charge and is not affected by the issuance of a Notice of Dismissal or Termination to any aggrieved person.

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**DEPARTMENT OF HOMELAND SECURITY****Coast Guard****33 CFR Part 117**

[CGD01–03–111]

**Drawbridge Operation Regulations: Niantic River, CT**

**AGENCY:** Coast Guard, DHS.

**ACTION:** Notice of temporary deviation from regulations.

**SUMMARY:** The Commander, First Coast Guard District, has issued a temporary deviation from the drawbridge operation regulations for the Amtrak Bridge across the Niantic River, mile 0.0, at Niantic, Connecticut. This temporary deviation will allow the bridge to remain in the closed position from 7 a.m. on January 2, 2004 through 8 p.m. on February 15, 2004. This temporary deviation is necessary to facilitate structural repairs at the bridge.

**DATES:** This deviation is effective from January 2, 2004 through February 15, 2004.